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CROW TRIBAL COUNCIL

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 29, 2000

96-45

Honorable William E. Kennard, Chairman
Commissioner Furchgott-Roth
Commissioner Ness
Commissioner Powell
Commissioner Tristani
The Federal Communications Commission
445 - 12th Street, SW
Washington, D.C. 20554

Dear Chairman Kennard, Ladies and Gentlemen:

As Chairman of the Crow Tribe of Indians from the State of Montana, I am writing to re-affirm the Crow Tribe's devotion to developing solutions to help provide residents of the Crow Reservation with affordable telephone services. That is why the Crow Tribe enthusiastically supports Western Wireless' efforts to provide affordable wireless telecommunications and an expanded local calling area to the Crow Reservation. Therefore, the Crow Tribe fully supports Western Wireless' Petition seeking designation as an eligible telecommunications carrier ("ETC") for the Crow Reservation. The Crow Tribe respectfully requests the FCC to exercise its jurisdiction in this matter. Further, the Crow Tribe maintains that as a sovereign nation, it has inherent powers to enter into a consensual, commercial relationship with Western Wireless, free from interference by regulation from Montana's Public Service Commission, (Montana PSC).

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The Crow Tribe believes that wireless technology will provide much needed and long awaited affordable telephone coverage to many of its tribal members who have gone without telephones in their homes for decades. Currently, many tribal households simply cannot afford telephone services through the local carriers due to the limited local calling area. The fact that Tribal members incur unwanted long distance charges for making personal and business calls to others within their own Reservation, and beyond, makes it cost prohibitive for them to own a telephone. The anticipated introduction of wireless services through Western Wireless will provide the much need competition that is missing from our Reservation. Western Wireless promotes its ability to provide telephone services to even the most remote homes on the Reservation with expanded local calling areas, without expensive hook up fees.

In reconsidering Western Wireless' request to be designated as an ETC, the Crow Tribe respectfully requests the FCC to: 1) assume jurisdiction over this matter pursuant to Section 214 (c) (6); and 2) grant Western Wireless ETC status. Reservation residents must be given the opportunity to enjoy affordable telephone service in their homes, which has become a basic necessity for everyone in the United States. Further, Reservation residents should benefit from an environment of competition instead of the traditional monopoly that has plagued the Crow Reservation; that has resulted in the horrific lack of telecommunication services that currently exists.

Even the threat of competition has already positively influenced change on the Crow Reservation. Project Telephone recently expanded the local calling area within its coverage area of the Crow Reservation. The Crow Tribe asserts it was in response to Western Wireless' proposal to provide services to the Reservation. The Crow Tribe anticipates that the added competition of a second carrier will help make hook up and basic services more affordable and

alleviate unwanted toll charges. Competition is the key to the provision of affordable telephone services to all residents of the Crow Reservation, as previously demonstrated by Project Telephone's expansion of its local calling area. The time has come to bring more telephones to the Reservation so everyone can enjoy the convenience of telephone service which 98% (ninety-eight percent) of the homes in the United States currently enjoy.

We do not agree with the Commission's decision that our tribal sovereignty is preempted by the State of Montana. Our Crow Tribe Public Utility Commission and the Crow Tribal Council working with Western Wireless will do what is necessary to establish a local loop wireless system for our reservation system for the wireless local loop system we want from Western Wireless. This is our sovereign right and our sovereign responsibility. We expect your support in this process.

Western wireless has deferred appropriately to our tribal sovereignty by responding to our request to make a business presentation to us and be entering into a Joint Statement of Interest with our tribal government. Western Wireless has responded appropriately to our tribal attorneys and to our tribal officials. We expected the same from the FCC. We have not received your support, understanding or respect for our tribal sovereignty.

The legal document prepared by our tribal attorneys (attached) embodies the reasons why the Crow Tribe requests reconsideration. This is about sovereignty, service, time, money and need -- but mostly, its about our Crow Tribal sovereignty and the sovereignty of the other eight-two (82) tribes who have written to you in support of our request. The tribes are united in protecting our sovereignty. Protecting and preserving our sovereignty is a common concern of every native tribal government in this country. We are most pleased and grateful for the support of Senator Campbell and Senator Inhofe and with the support from eight members of the House

of Representatives. They want you to grant ETC status to Western Wireless as we have requested.

In sum, The Crow Tribe of Montana respectfully requests that the Commission reconsider its decision not to assume jurisdiction outright over designation of a carrier that serves only a reservation as an ETC. Requiring a carrier to establish Commission jurisdiction through an exhaustive legal proceeding will have a chilling effect on any carrier seeking to provide service on reservations, ignores the Commission's federal trust responsibility, and takes away from the tribes their ability for self-determination.

Respectfully submitted,

Clifford Berlingrand
The Crow Tribe

by *Sam Painter*

Cc/ Chairman William Kennard
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Harold Furchgott-Roth
Commissioner Gloria Tristani

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Federal-State Joint Board on Universal Service;)
Promoting Deployment and Subscribership in)
Unserved and Underserved Areas, Including)
Tribal and Insular Areas)
)
Western Wireless Corporation, Crow Reservation)
In Montana)
)
Smith Bagley, Inc.)
)
Cheyenne River Sioux Tribe Telephone Authority)
)
Western Wireless Corporation, Wyoming)
)
Cellco Partnership d/b/a/ Bell Atlantic Mobile, Inc.)
)
Petitions for Designation as an Eligible)
Telecommunications Carrier and for Related)
Waivers to Provide Universal Service)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 96-45

Petition for Reconsideration
By
The Crow Tribe of Montana

The Crow Tribe of Montana hereby submits this Petition for Reconsideration of the Commission's *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, FCC 00-208, released on June 30, 2000 ("*Twelfth Report and Order*"). In the *Twelfth Report and Order*, the Commission adopted rules and policies for, among other things, considering a request by a carrier to be designated as an Eligible Telecommunications Carrier ("ETC") on tribal lands. The Crow Tribe respectfully requests that the Commission reconsider its decision not to assume jurisdiction outright over the designation of a carrier as an ETC on tribal lands. In concluding that "whether a carrier providing service on tribal lands is subject to the jurisdiction of a state commission is a complicated and intensely fact-specific legal inquiry informed by principles of tribal sovereignty and requiring the interpretation of treaties, and federal Indian law and state law," the Commission fails to recognize its federal trust responsibility to the tribes and that it is the Commission's responsibility to designate a carrier seeking to serve only areas within a established reservation as an ETC.

I The FCC Must Assume Jurisdiction in This Matter by Pre-empting State Regulation.

The FCC clearly has jurisdiction to determine Western Wireless' ETC status on the Crow Reservation, which on behalf of the Crow Tribe, pre-empts jurisdiction of Montana PSC. Statutory language in Section 214(e)(6) of the Communications Act, as amended, provides clear authority for the FCC to grant ETC status to telecommunications carriers, including wireless carriers, such as Western Wireless Corporation, to facilitate access to telecommunication services on Indian reservation trust lands. Section 214(e)(6) provides for ETC designation of carriers not subject to state commission jurisdiction and states, in relevant part:

In the case of common carriers providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State Commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunication carrier for a service area designated by the Commission consistent with applicable federal and State Law.

Thus, the elements of Section 214(e)(6) which trigger ETC designation by the FCC are: (1) common carrier status, (2) provision of the telephone exchange service and exchange access, and (3) lack of a state commission's jurisdiction over the carrier. Elements one and two are not in dispute and will not be discussed herein. The Crow Tribe asserts element three is clearly satisfied when the Crow Tribe asserts its sovereignty by requesting the FCC to act on its behalf.

The question of whether the State Commission has the power to regulate Western Wireless on the Crow Reservation should clearly be treated as an issue of pre-emption:

State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). Here, since the passage of the Telecommunications Act of 1996, the FCC has made particular efforts to ensure

that all Americans, in all regions of the United States, have the opportunity to access telecommunications and information services. The FCC has publicly recognized that Indian Reservations and Tribal Lands remain underserved, with some areas having no service at all. The FCC has made a commitment to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance to ensure, through its regulation and policy initiatives, and consistent with Section (1) of the Communication Act of 1934, that Indian Tribes have adequate access to communications services. *FCC Policy Statement 00-207*, June, 2000.

Also, as stated, the Crow Tribe fully supports all efforts regarding increased access to telecommunications and information services. Thus, the Federal and Tribal interests clearly demonstrate common goals in providing better access to telephone services for residents of the Crow Reservation. The Crow Tribe doubts Western Wireless' ETC Petition will be granted if subjected to State jurisdiction, given the current weak regulation Montana has had over local exchange carriers on the Crow Reservation within this State. The consequences are clear. Status quo will remain and Reservation residents will continue to suffer. Currently, sixty-five percent of Crow homes are without telephone service, and those with telephones are subject to unreasonably limited long distance calling areas. Further, given Montana's propensity towards protecting the existing local exchange carriers, there exists a direct conflict between Federal and Tribal interests on one hand, and the Montana PSC's interests on the other.

To date, the Montana PSC has not indicated any support for Western Wireless, or any willingness to grant ETC status to Western Wireless. On the contrary, it appears that the State Commission, (if wrongly provided jurisdiction) is more likely to protect the interests of the existing local carriers by denying Western Wireless' Petition for ETC status. Such denial clearly

conflicts with Federal and Tribal interests in the expansion of telephone services on the Crow Reservation, and would be contrary to the Crow Tribe's desire. It is clear to the Crow Tribe that any exercise of state jurisdiction would be incompatible with and would interfere with the Federal and Tribal interests. Therefore, state jurisdiction in this matter is pre-empted by operation of Federal Law pursuant to Section 214 (e) (6), and the holding in *New Mexico v Mescalero Apache Tribe*.

II State regulation is not consistent with Tribal Sovereignty and Self-Determination, thus, the FCC, not the State Commission, must assume jurisdiction to determine Western Wireless' ETC status.

A. The FCC must carefully consider the sovereignty of the Crow Tribe in reaching its decision to assume jurisdiction in this matter.

At its most basic definition, the term sovereignty refers to the inherent sovereign Tribe's right or power to self-governance. Historically, prior to European contact, tribes were sovereign by nature and necessity. Each tribe conducted its own affairs and depended upon no outside source of power to legitimize its acts of government. By leaving Tribes free to regulate their own internal affairs, the federal government has long recognized the sovereign status of the Tribes. In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Supreme Court characterized the tribes as "domestic dependent nations." Meaning that tribes, although sovereign nations, are denominated as domestic dependent nations under the dominion of the Federal Government only, not the individual states.

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), the Supreme Court had further opportunity to discuss the status of the tribes:

*The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial * * *.*

The opinion in *Worcester* went on to hold that the laws of Georgia could have no force in Cherokee Territory. The Court ultimately left a view of the tribes as nations whose independence had been limited in only two essentials--the conveyance of land and the ability to deal with foreign powers. For all internal purposes, the tribes were sovereign and free from state intrusion on that sovereignty. Although the Supreme Court's position has been subject to some modification, it still provides the foundation for determining the governmental role of the tribes. The principle that Tribes should be free from state intrusion applies directly in this case. Congress has never specifically delegated jurisdiction to the State Commission over Tribal Reservations. Since Congress has been silent about this issue, the FCC must assume jurisdiction to determine Western Wireless' ETC status on the Crow Reservation.

In demarcating the respective spheres of State and Tribal authority over Indian Reservations, the Supreme Court has continued to stress that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 2582, 65 L.Ed.2d 665 (1980), quoting *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975). Because of their sovereign status, tribes and their reservation lands are insulated in some respects by an "historic immunity from state and local control," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973), and tribes retain any aspect of their historical sovereignty not "inconsistent with the overriding interests of the National Government." *Washington v. Confederated Tribes*, *supra*, 447 U.S. at 153, 100 S.Ct. at 2588. See also Indian Reorganization Act, § 1 et seq., 25 U.S.C.A. § 461 et seq.; Act March 29, 1928, 45 Stat. 1716; Indian Financing Act of 1974, §§ 2-503, 25 U.S.C.A. §§ 1451-1543.

The sovereignty retained by tribes includes "the power of regulating their internal and

social relations," *United States v. Kagama*, 118 U.S. 375, 381-382, 6 S.Ct. 1109, 1112-1113, 30 L.Ed. 228 (1886), cited in *United States v. Wheeler*, 435 U.S. 313, 322, 98 S.Ct. 1079, 1085, 55 L.Ed.2d 303 (1978). See also Indian Reorganization Act, § 1 et seq., 25 U.S.C.A. § 461 et seq.; Act March 29, 1928, 45 Stat. 1716; Indian Financing Act of 1974, §§ 2-503, 25 U.S.C.A. §§ 1451-1543. A tribe's power to prescribe the conduct of tribal members has never been doubted, and the United States Supreme Court cases establish that "absent governing Acts of Congress," a State may not act in a manner that "infringed on the rights of reservation Indians to make their own laws and be ruled by them." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171-172, 93 S.Ct. 1257, 1261-1262, 36 L.Ed.2d 129 (1973), quoting *Williams v. Lee*, 358 U.S. 217, 219-220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959). See also *Fisher v. District Court*, 424 U.S. 382, 388-389, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976) (per curiam).

The major consequence of the view of tribes as sovereigns is that, when a dispute arises over the exercise of tribal powers of self governance, versus state governments, the decision maker (the FCC) must begin with the assumption that the power exists. In other words, the Crow Tribe is distinct and unlike a city or other subdivision of the State of Montana. When a question arises as to the power of the city; the state, not the city, is the sovereign body from which power must flow. The Crow Tribe, on the other hand, is its own source of power. The Crow Tribe possesses such power unless specifically limited by Congress or rule of law.

For instance, a tribe's right to establish a court or levy a tax is not subject to attack on the grounds that Congress has not authorized the tribe to take these actions; the tribe is sovereign and needs no authority from the federal government. *Iron Crow v. Oglala Sioux Tribe*, 213 F.2d 89 (8th Cir. 1956); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982). Here, Congress has remained silent on the issue of state regulation of telecommunications over Indian Reservations.

If Congress had intended to grant jurisdiction to state commissions over Indian Reservations, it could have easily done so in the Telecommunications Act of 1964, or in other subsequent legislation. Since there are no federal provisions for state regulation over Indian Reservations, a strong presumption exists that the FCC on behalf of the Tribes has to the power to regulate telecommunications on Indian Reservations.

The relevant inquiry is whether any limitation exists to prevent the tribe from acting, not whether any authority exists to permit the tribe to act. See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985). As a sovereign, a tribe is free to act unless some federal intrusion has affirmatively modified its sovereignty. As stated above, Congress has never affirmatively acted to modify Tribal Sovereignty regarding telecommunications regulation.

B. The two exceptions established by the Supreme Court in *Montana v. U.S.* apply directly to this matter and clearly establish that the FCC must assume jurisdiction to determine Western Wireless' ETC status.

Although the Supreme Court in *Montana v. United States* 450 U.S. 544 (1981), held that the Crow Tribe lacked inherent power to regulate hunting and fishing by non-Indians on non-Indian-owned land within its reservation, the Court also added two important exceptions to its ruling. The Tribes retained inherent sovereign power, even on fee lands: (1) to regulate by taxation, licensing or other means, activities of non-members who enter consensual relationships with the tribe or its members, as by commercial dealing; and (2) to regulate conduct of non-Indians that threatens or directly affects "the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66.

The *Montana* exceptions clearly indicate that the FCC has jurisdiction in this matter, not the State Commission. Regarding the first *Montana* exception, the Crow Tribe intends to enter into a consensual relationship with Western Wireless to provide much need wireless telephone

services. This consensual relationship, a commercial dealing, falls squarely within the first *Montana* exception. The Crow Tribe insists that its inherent sovereign powers include the right to enter into a business relationship with Western Wireless, free from state interference.

Regarding the second *Montana* exception, telephone service is absolutely essential for the social well being, health, and economic stability of the members of the Crow Tribe. To date, the current scheme has failed to provide telephone service to Reservation residents equal to penetration percentages nationwide. While ninety-eight percent of the homes in America have telephones, only thirty-five percent of the homes on the Crow Reservation have telephones. This means, when faced with an emergency, sixty-five percent of the households on the Crow Reservation do not have access to expedient emergency assistance. Unfortunately, those without telephones must depend on runners to go to the nearest home with a telephone to make emergency calls. Where an accident or violence is involved, the extra time it takes to access emergency help via the nearest telephone often means the difference between life and death.

Further, in line with the second *Montana* exception, the federal government has a trust responsibility to the Crow Tribe, and this responsibility requires the federal government to adhere to certain fiduciary standards in its dealing with Indian tribes. The federal government has a longstanding policy of promoting tribal self sufficiency and economic development as embodied in various federal statutes. The newly elected Tribal Officials are very focused on economic development. The Officials are devoted to directing significant efforts to attract and build businesses which will increase employment thereby improving the economy on the Crow Reservation. The addition of universal wireless technology to the Crow Reservation is essential for economic development. The Crow Tribe asserts it rights to set its own communications priorities and goals for the welfare of our membership without interference from the State of

Montana. It is imperative that the FCC honor its fiduciary duty and the Crow Tribe's sovereignty, by exercising its exclusive jurisdiction in this matter.

- C. **State legislation expressly excludes the State Commission from regulating cellular service, leaving either the Crow Tribe or the FCC on behalf of the Crow Tribe as the only governing bodies having the authority to regulate Western Wireless, once ETC status is granted.**

Congress created the FCC for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available to all the people of the United States wire and radio communication service with adequate facilities at reasonable charges. 47 U.S.C. Sec. 151. Montana enacted the "Montana Telecommunications Act" in 1985 to regulate the telephone communications industry. M.C.A 69-3-801 et seq. The Montana Telecommunications Act defines "*Regulated telecommunications service*" as: *two-way switched, voice grade access and transport of communications originating and terminating in this state...* M.C.A 69-3-803 (6) (a). However, M.C.A 69-3-803 (6) (b) states: "*the term does not include the provision of terminal equipment used to originate or terminate the regulated service, private telecommunication service, one-way transmission of television signals, cellular communication, or provision of radio paging or mobile radio services.*" The service that Western Wireless is offering to provide is cellular communication. Since cellular communication is excluded from the definition of regulated telecommunications service, it is apparent that the State Commission cannot regulate Western Wireless once it is granted ETC status on the Crow Reservation.

M.C.A. 69-3-840 *authorizes the commission to designate telecommunications carriers as eligible for federal universal service support. The authorization applies to all telecommunications carriers notwithstanding the carriers's exemption from further regulation.* The practical result of the foregoing provisions of the Montana Telecommunications Act is that

although the State Commission does not regulate cellular service, the Act authorizes the Commission to determine a telecommunications provider's ETC status. Therefore, once ETC status is granted to Western Wireless, the Crow Tribe, or the FCC on behalf of the Crow Tribe are the only governing bodies with authority to regulate Western Wireless. Thus, the State's assumption of jurisdiction over all ETC petitions within its boundaries actually serves as a provision to protect local carriers from competition, which is counter to *the policy of the State of Montana to encourage competition in the telecommunications industry*. see M.C.A 69-3-801.

The Crow Tribe's inherent sovereignty, coupled with the State Commissions express lack of authority to regulate cellular service makes it incumbent upon the FCC to assume jurisdiction to determine Western Wireless' ETC status. As earlier stated, no authority has been granted supporting the State Commission's intrusion on tribal sovereignty. To the contrary, Section 214 (e) (6) should be interpreted to restrict State Commissions from exercising jurisdiction over matters such as Western Wireless' ETC status, especially on Reservation lands.

CONCLUSION

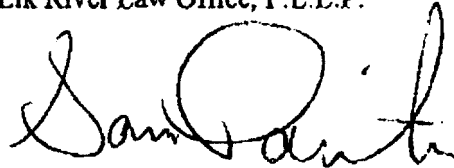
The members of the Crow Tribe and residents of the Crow Reservation have waited much too long for the opportunity to enjoy telephone services that most citizens in the United States take for granted. Under the current state regulation of traditional ground line telephone services, sixty-five percent of Crow households go without telephones. The current scheme is obviously not working. The FCC has the opportunity to rectify this situation by: 1) rightfully assuming jurisdiction to determine Western Wireless' ETC status; and 2) granting ETC status to Western Wireless. Affordable wireless telephone services with extended local calling areas will provide the access to communication that will advance the economic development of the Crow Tribe. Thus enhancing the safety, health, economic and social welfare of all residents of the Crow

Reservation. The FCC has the opportunity to expedite the process of delivering more telephones to Crow homes and other Reservation residents, which will help bring the Crow Tribe into the 21st Century. The FCC's decision in this case will likewise have a broad impact on numerous other Indian Nations plagued with similar inadequate telephone services. The Crow Tribe urges the FCC to assert its jurisdiction over this case to pave the way for improved telephone services throughout Indian Country which is currently under served.

Based on the Crow Tribe's inherent sovereignty, the principals of federal preemption, and the failure of the current local carriers to provide adequate penetration under regulation by the State of Montana, the Crow Tribe respectfully requests that the FCC pre-empt state jurisdiction and accept jurisdiction to determine Western Wireless' ETC status.

Respectfully submitted,

Elk River Law Office, P.L.L.P.



Sam S. Painter
General Counsel for the Crow Tribe of Indians

cc: Honorable Susan Ness, Commissioner
Honorable Harold W. Furchgott-Roth, Commissioner
Honorable Michael K. Powell, Commissioner
Honorable Gloria Tristani, Commissioner